No.

# In the Supreme Court of the United States

OCTOBER TERM, 1997

TOGO D. WEST, JR., SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS, PETITIONER

*v.*

MICHAEL GIBSON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has the authority to award compensatory damages against agencies of the federal government for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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*FOR THE SEVENTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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The Solicitor General, on behalf of the Secretary of the Department of Veterans Affairs, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 137 F.3d 992. The opinion of the district court (App., *infra*, 15a-28a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on May 7, 1998. App., *infra*, 29a-30a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth at App., *infra*, 31a-35a.

## STATEMENT

This case concerns the authority of the Equal Employment Opportunity Commission (EEOC) to award compensatory damages against agencies of the federal government on claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

1. In 1972, Congress extended to the federal government Title VII's prohibition against employment discrimination on the basis of "race, color, religion, sex or national origin." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. 2000e-16 (Supp. II 1996)); see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Until it was amended in 1972 * * *, Title VII did not protect federal employees."). But Title VII was not to apply to the federal government in precisely the same manner that it applied to other employers. Congress crafted a distinct set of "administrative and judicial enforcement mechanisms," *Brown*, 425 U.S. at 831, for claims of employment discrimination asserted by federal employees and applicants for federal employment.[1]

[1] Section 2000e-16 currently applies to civilian employees or applicants for employment in executive agencies, military departments, the Postal Service, the Postal Rate Commission, the Government Printing Office, the General Accounting Office, the Library of Congress, and those units of the judicial branch of the federal government and of the District of Columbia government having positions in the competitive service. 42 U.S.C. 2000e-16(a) (Supp. II 1996).



Congress delegated initially to the Civil Service Commission, and later to the EEOC,[2] the authority to "enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees, with or without back pay." 42 U.S.C. 2000e-16(b). At the same time, Congress imposed "certain preconditions," *Brown*, 425 U.S. at 832, on a federal employee's ability to file a civil action in federal district court on a claim of employment discrimination. See 42 U.S.C. 2000e-16(c). The employee first "must seek relief in the agency that has allegedly discriminated against him." *Brown*, 425 U.S. at 832. If the employee is dissatisfied with the agency's disposition of his claim, he may "seek further administrative review with the [EEOC]" or, alternatively, may "file suit in federal district court without appealing to the [EEOC]." *Ibid.* If the employee does appeal to the EEOC, but is dissatisfied with the EEOC's decision, he then may file suit in district court. *Ibid.* An employee also "may file a civil action if, after 180 days from the filing of the charge or the appeal, the agency or [the EEOC] has not taken final action." *Ibid.*

2. In 1991, Congress authorized awards of compensatory damages in an "action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)). Section 717, 42

[2] All responsibility for enforcing equal opportunity in federal employment was transferred to the EEOC from the Civil Service Commission, Reorg. Plan No. 1 of 1978, § 3, 43 Fed. Reg. 19,807 (1978). See 42 U.S.C. 2000e-4 note (1994 & Supp. II 1996).

U.S.C. 2000e-16 (1994 & Supp. II 1996), is the provision of the Civil Rights Act of 1964 governing Title VII claims against the federal government, while Section 706, 42 U.S.C. 2000e-5, is the provision governing Title VII claims against other employers. Title VII had previously authorized only back pay and other equitable remedies. See 42 U.S.C. 2000e-5(g)(1).[3]

3. In 1992, respondent Michael Gibson, an accountant employed by the Department of Veterans Affairs (the VA), was denied a promotion. The position went to a woman instead. Gibson filed a complaint with the VA, alleging sex discrimination in violation of Title VII. He sought back pay and a transfer to another VA hospital. The VA issued a decision finding no discrimination. App., *infra*, 2a, 16a.

Gibson appealed the decision to the EEOC, which found that the VA had discriminated against Gibson. The EEOC ordered the VA to promote Gibson with back pay. App., *infra*, 2a-3a, 16a-17a.

4. Gibson filed suit in federal district court to compel the VA's compliance with the EEOC's order.[4] He

[3] The 1991 Act also authorized awards of punitive damages in Title VII actions against private employers, but not against "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

[4] The VA had not acted within the period prescribed by the EEOC to promote Gibson and to calculate his back pay. The EEOC had directed that Gibson be promoted by December 6, 1995, but the VA did not actually promote him until December 23, 1995. The EEOC had directed that Gibson's back pay be calculated by January 5, 1996, and that Gibson be paid by March 5, 1996; in fact, the VA calculated Gibson's back pay on January 29, 1996, and paid him on February 22 and 24, 1996. Gibson filed this action in the district court on January 11, 1996. App., *infra*, 16a-17a.



also sought compensatory damages—which he had not sought at the administrative level—for alleged "humiliation, mental anguish and emotional distress." App., *infra*, 3a, 4a, 21a.

The district court dismissed those claims. The court determined that Gibson's claims for promotion and back pay were moot because the VA had by that time fully complied with the EEOC's order. App., *infra*, 21-22a, 26a. The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies because he had not presented that claim to the VA and the EEOC. *Id.* at 20a-24a.[5]

5. The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims. App., *infra*, 5a-14a. The court noted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'" *Id.* at 6a (quoting *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992)). The court then concluded that the EEOC does not have the authority under Title VII to award compensatory damages against federal agencies. *Id.* at 9a-13a.

[5] The court also rejected Gibson's claims for front pay and a job transfer. App., *infra*, 24a-25a. The court reasoned that front pay is unwarranted where, as here, the claimant receives the promotion that he was previously denied. *Ibid.* And the court concluded that Gibson had "not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer." *Id.* at 25a. The court did conclude that Gibson was entitled to an award of attorneys' fees, because the VA had not fully complied with the EEOC's order by the time that the suit was filed. *Id.* at 26a-27a.

The court of appeals acknowledged that "[n]othing in the statute or regulations explicitly rules out" the EEOC's awarding compensatory damages on federal employees' claims under Title VII. App., *infra*, 6a. The court also acknowledged that "[i]t is not unreasonable to conclude" that the EEOC's statutory mandate to adjudicate Title VII claims against federal agencies "might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress." *Id.* at 7a. And the court noted that the Fifth Circuit had recently held that Congress authorized the EEOC to award compensatory damages on Title VII claims arising in the federal sector. *Ibid.* (citing *Fitzgerald* v. *Secretary, U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997)). The court nonetheless held that several factors compelled a contrary conclusion.

The court of appeals principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." See App., *infra*, 9a-10a. A "trial by jury" cannot, of course, occur in an EEOC administrative proceeding. The court recognized that Section 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court. *Id.* at 9a. But the court rejected that construction. The court noted that a federal agency is bound by the EEOC's disposition of a Title VII complaint, although a claimant is not so bound and may seek relief de novo in district court. *Id.* at 9a-10a. A federal agency thus could not demand a jury trial to review an EEOC award of compensatory



damages to a claimant. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims. *Id.* at 10a.

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1) providing for compensatory damages awards only in "an action brought by a complaining party" under, *inter alia*, the statutory provision allowing Title VII claims against the federal government. App., *infra*, 10a. The court declined to defer to the EEOC's construction of Section 1981a(a)(1) as encompassing administrative as well as judicial proceedings. *Id.* at 7a-9a. The court concluded that Congress generally used the term "actions" in Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC." *Id.* at 11a.

Finally, the court of appeals invoked the principle that any waiver of the federal government's sovereign immunity should be strictly construed. App., *infra*, 12a (citing *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981)). The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII. *Id.* at 11a-12a. But the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial." *Id.* at 12a.

## REASONS FOR GRANTING THE PETITION

The Seventh Circuit held in this case that the EEOC has no authority to award compensatory damages against agencies of the federal government for violations of Title VII of the Civil Rights Act of 1964. The Seventh Circuit's decision squarely conflicts with a recent decision of the Fifth Circuit, which held that the EEOC may award compensatory damages on Title VII claims against federal agencies, and with the EEOC's own decisions construing its authority. As the Fifth Circuit recognized, Congress vested the EEOC with broad authority to enforce Title VII in the federal sector, including the authority to provide "appropriate remedies" to federal employees who are victims of employment discrimination. 42 U.S.C. 2000e-16(b). And Congress has made clear that the appropriate remedies for violations of Title VII by the federal government include compensatory damages. 42 U.S.C. 1981a(a)(1).

In holding that federal employees may recover compensatory damages under Title VII only in civil actions in federal district court, and not in EEOC proceedings, the Seventh Circuit has undermined the administrative exhaustion requirement of 42 U.S.C. 2000e-16(c) and imposed burdens on federal employees, federal agencies, and the federal courts that Congress could not have intended. It makes no sense to require federal employees to pursue administrative remedies in order to obtain equitable relief, including back pay, but to require them to go to court in order to obtain compensatory damages for the same acts of discrimination. This Court's review is necessary to clarify the law in this area, so that the extent of a federal employee's obligation to exhaust administrative remedies on his Title VII claims does not vary from circuit to circuit, and to ensure that the resolution of such claims does not become unduly costly, cumbersome, and time-consuming.



1. Although Congress has not stated, in so many words, that the EEOC may award compensatory damages on Title VII claims against agencies of the federal government, the EEOC's authority to do so is evident from the text and structure of Title VII. Cf. App., *infra*, 6a (acknowledging that "[n]othing in the statute or regulations explicitly rules out the idea").

Congress has delegated to the EEOC "full authority to enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees, with or without back pay." *Brown* v. *General Services Admin.*, 425 U.S. 820, 831-832 (1976) (quoting 42 U.S.C. 2000e-16(b)). Congress has further authorized the EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities" to ensure that the federal workforce is "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) and (b) (Supp. II 1996). Congress thus did not specify the particular remedies that the EEOC may, and may not, award against federal agencies. Congress instead vested the EEOC with broad discretion to determine which remedies, among those authorized by law, are "appropriate" based upon its expertise with regard to employment discrimination generally and in the federal workplace specifically. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program

necessarily requires * * * the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)).

In 1991, Congress added compensatory damages to the array of remedies available under Title VII against federal agencies as well as other employers. Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)) (authorizing compensatory damages in any "action brought by a complaining party under section * * * 717 of the Civil Rights Act of 1964"—the provision that extended Title VII to the federal government—"against a respondent who engaged in unlawful intentional discrimination"). Nowhere did Congress expressly limit the EEOC's authority to award such damages against federal agencies. It thus follows that the EEOC possesses the authority to award compensatory damages as an "appropriate remed[y]" under Title VII.

The EEOC has maintained since 1992 that compensatory damages are among the remedies that it may award on Title VII claims against federal agencies. See *Jackson* v. *United States Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 407. The EEOC's position is based, in part, on its view that the 1991 legislation, in authorizing compensatory damages in Title VII "action[s]" against federal agencies, refers to administrative as well as judicial proceedings. In upholding the EEOC's authority to award compensatory damages, the Fifth Circuit concluded that, whether or not administrative proceedings are "actions," Congress, by making compensatory damages available in judicial proceedings, gave the EEOC the authority to award the same relief in administrative proceedings. See *Fitzgerald* v. *Secretary, U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 207 (1997) (relying on EEOC's "wide-ranging authority to enforce the anti-discrimination provisions of [Title VII]"). There is no reason to suppose, as did the Seventh Circuit (App., *infra*, 11a), that by authorizing the award of compensatory damages in Title VII "actions," Congress meant to deny the EEOC the authority to award such damages.



2. Congress's clear design in Title VII to encourage the resolution of employment discrimination claims against federal agencies at the administrative level, see 42 U.S.C. 2000e-16(c), would be undermined if the EEOC did not have the authority to resolve such claims fully through awards of compensatory damages as well as other "appropriate remedies." Under Section 2000e-16(c), an employee must first present his Title VII claim to the agency that allegedly discriminated against him. If the employee does not obtain full relief from the agency, he may either appeal to the EEOC or file suit in federal district court. (He may also go to district court if his EEOC appeal is unsuccessful.) Section 2000e-16(c) serves the salutary purpose of enabling Title VII claims to be resolved at the administrative level, without all of the expense, delay, and disruption associated with litigating such claims in court. See, *e.g.*, *Tolbert* v. *United States*, 916 F.2d 245, 249 n.1 (5th Cir. 1990); *Nordell* v. *Heckler*, 749 F.2d 47, 49 (D.C. Cir. 1984); *Jordan* v. *United States*, 522 F.2d 1128, 1132 (8th Cir. 1974); see generally *McKart* v. *United States*, 395 U.S. 185, 195 (1969) (noting that administrative exhaustion requirements serve "very practical notions of judicial efficiency," because "the courts may never have to intervene" if a complainant is "successful in vindicating his rights in the administrative process").

Under the Seventh Circuit's decision, although a federal employee still must exhaust administrative remedies with respect to a claim under Title VII for equitable relief, including back pay, the employee need not also exhaust administrative remedies with respect to a claim for compensatory damages based on the same underlying acts of discrimination. According to the Seventh Circuit, because the EEOC does not have the authority to award compensatory damages, the employee need not present any claim for compensatory damages to the EEOC. And, while the Seventh Circuit did not expressly address whether the employee need present a compensatory damages claim to his own agency in the first instance, its rationale suggests that the employee may not have to present such a claim to the agency either. In holding that respondent did not violate the administrative exhaustion requirement of Section 2000e-16(c) when he failed to raise his compensatory damages claim before either the VA or the EEOC, the Seventh Circuit apparently reasoned that the VA, like the EEOC, could not award such damages and, consequently, that respondent was not required to seek them at either stage of the administrative process. Respondent thus was permitted to assert his compensatory damages claim for the first time in a civil action in federal district court.

The procedure authorized by the Seventh Circuit would, as the Fifth Circuit recognized in *Fitzgerald*, "be antithetical to the exhaustion requirement" of Section 2000e-16(c). 121 F.3d at 207 (concluding that compensatory damages claims must be presented to both the agency and the EEOC). A claimant "would be encouraged either to intentionally bypass the administrative process and go straight to district



court or perfunctorily go through the administrative process and then seek judicial review to obtain full relief." *Ibid.* (internal quotation marks omitted). The costs to the government and to claimants of fully resolving Title VII claims would thereby be increased significantly. And the workload of the federal courts would be further expanded. Cf. *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 56 (1993) (noting the already "congested civil dockets in federal courts").

According to the EEOC, 26,410 administrative complaints of employment discrimination were filed against federal agencies in fiscal year 1996. See EEOC, *Federal Sector Report of EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996*, at 1.[6] Such complaints often seek compensatory damages as well as equitable relief. The majority of such claims are resolved at the agency level, without an appeal to the EEOC or a civil action in federal district court. In fiscal 1996, however, the EEOC closed 4,537 appeals of cases raising claims under Title VII, often ordering corrective action, including awards of compensatory damages. *Id.* at 74; see also, *e.g.*, *Turner* v. *Babbitt*, No. 1956390, 1998 WL 223578, at *5-6 (EEOC Apr. 27, 1998) (citing recent administrative appeals in which the EEOC awarded compensatory damages). If the EEOC does not have the authority to award compensatory damages against federal agencies, as the Seventh Circuit held, many such cases could not be closed at the

[6] The number includes not only claims of discrimination on the basis of race, color, religion, sex, or national origin, within the scope of Title VII, but also claims of discrimination on the basis of age and disability.

administrative level and instead would reach the federal courts.[7] And if, as the rationale of the Seventh Circuit's decision might suggest, federal agencies likewise cannot award compensatory damages at the first stage of the administrative process, the burden on the federal courts would be still greater.

3. The Seventh Circuit's decision rests primarily on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory * * * damages under this section," then "any party may demand a trial by jury." The court reasoned that, if the EEOC could award compensatory damages against federal agencies, the agencies would be deprived of that statutory right to a jury trial, because agencies are bound by the EEOC's dispositions of Title VII claims. App., *infra*, 10a; see 42 U.S.C. 2000e-16(c) (providing for civil actions only by "an employee or applicant for employment" who does not prevail at the administrative level); 29 C.F.R. 1614.504(a) (1996).

Congress could reasonably have determined, however, that the interests of federal agencies as employers would be adequately served when compensatory damages were awarded by the EEOC rather than a jury. Congress does not appear to have viewed Section 1981a(c)(1), as did the Seventh Circuit (App., *infra*, 10a), as providing "a significant procedural right" for employers. To the contrary, to the extent that members of Congress addressed the jury trial

[7] The EEOC has calculated that 768 of the appeals that it received from federal employees in fiscal 1996 originated in the States of the Seventh Circuit. Even if only some of those employees had chosen to bypass the EEOC and to go directly to district court, the impact on the judicial workload in the Seventh Circuit could have been significant.



provision during their consideration of the Civil Rights Act of 1991, they portrayed the provision as a benefit to employees and a detriment to employers.[8] The House Report specifically addressed concerns that juries would award disproportionately high damages in Title VII cases. See H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 72 (1991) (noting that jury discretion would be constrained by statutory damages caps, by allowing damages only in cases of

[8] See, *e.g.*, 137 Cong. Rec. 29,053-29,054 (1991) (statement of Sen. Wallop) (expressing concern that jury awards in Title VII cases would have an "economically devastating" impact on employers); *id.* at 29,051 (statement of Sen. Leahy) (noting that "[f]or the first time, women and the disabled could recover damages and have jury trials for claims of intentional discrimination" as a result of the legislation); *id.* at 29,041 (statement of Sen. Bumpers) (acknowledging employers' concerns about "being exposed to a runaway jury"); *id.* at 29,030 (statement of Sen. Symms) (asserting that "huge monetary award amounts are encouraged through jury trials"); *id.* at 29,022 (statement of Sen. Wirth) (stating that legislation "laid aside the misguided idea of denying women from having a jury determine whether or not they have been wronged"); *id.* at 28,926 (statement of Sen. Heflin) (describing provision as "allow[ing] jury trials for victims of sexual bias").

See also, *e.g.*, 137 Cong. Rec. 30,690 (1991) (statement of Rep. Dixon) (describing provision as "permit[ting] jury trials for victims of bias"); *id.* at 30,677 (statement of Rep. Hyde) (expressing concern that provision would operate to the detriment of employers); *id.* at 30,668 (statement of Rep. Ford) (describing provision as "provid[ing] all victims of intentional discrimination a right to trial by jury"); *id.* at 30,644 (statement of Rep. Doolittle) (describing various provisions of legislation, including "jury trials" provision, as creating "a tremendous injustice and burden to any employer").

All of those quoted, other than Senators Wallop and Symms and Representative Doolittle, voted in favor of the legislation.

intentional discrimination, and by the "additional check" provided by judges). No similar concerns were expressed that juries might, out of sympathy for employers, award disproportionately low damages in Title VII cases. Congress could thus have concluded that federal agencies did not need, and would not want, a jury trial right on all claims for compensatory damages under Title VII—a right that would preclude many such claims from being fully resolved at the administrative level without resort to the courts. Congress could instead have decided that the EEOC, with its expertise in adjudicating Title VII claims in the federal sector, provides agencies sufficient protection against unwarranted damages claims.[9]

The Seventh Circuit also rested its decision on the view that Congress did not specifically waive the United States' sovereign immunity from compensatory damages awards by the EEOC. App., *infra*, 11a-12a. But the court offered no authority for the proposition that a waiver of sovereign immunity with respect to judicial proceedings—which the court conceded had occurred (*ibid.*)—does not encompass a waiver of sovereign immunity with respect to administrative proceedings before an agency of the same sovereign.[10] In any event, as explained above, Congress indicated with sufficient clarity its intent that the EEOC be able to award compensatory dam-

[9] To be sure, where a claimant files a civil action against a federal agency after failing to prevail on a claim for compensatory damages at the administrative level, the agency, like the claimant, has the right to demand a jury trial under Section 1981a(c)(1).

[10] All of the cases relied on by the Seventh Circuit involved the question whether the United States had waived its immunity to suit in court. See App., *infra*, 12a-13a.



ages on Title VII claims against agencies of the federal government. See 42 U.S.C. 2000e-16(b) (authorizing EEOC to award "appropriate remedies" against federal agencies that violate Title VII); 42 U.S.C. 1981a(a)(1) (recognizing that compensatory damages are an appropriate remedy for Title VII violations by federal agencies).

4. The Seventh Circuit acknowledged (App., *infra*, 9a-10a, 13a-14a) that its decision in this case conflicts squarely with the Fifth Circuit's decision in *Fitzgerald*, which concluded that the EEOC's "wide-ranging authority to enforce the anti-discrimination provisions of [Title VII]" against federal agencies includes the authority to award compensatory damages. 121 F.3d at 207. The Fifth Circuit specifically noted the EEOC's statutory authority to grant "appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." *Ibid.* (quoting 42 U.S.C. 2000e-16(b)). The court concluded that "this mandate, as described in § 2000e-16(b), is sufficiently broad to allow the EEOC to offer * * * compensatory damages." *Ibid.*[11]

[11] The Seventh Circuit suggested that the Fifth Circuit might have reached a different conclusion in *Fitzgerald* had it considered the jury trial provision of Section 1981a(c)(1). App., *infra*, 10a. The Fifth Circuit did not, to be sure, specifically address Section 1981a(c)(1). But that does not necessarily mean that the Fifth Circuit was unaware of that provision—which is, after all, a subsection of Section 1981a, with which *Fitzgerald* displayed considerable familiarity—much less that the Fifth Circuit would have viewed the provision as dispositive of the question presented here. The Fifth Circuit may simply have

No other court of appeals has yet decided whether the EEOC has the authority to award compensatory damages against federal agencies for violations of Title VII. The Eleventh Circuit, however, recently requested supplemental briefing on that issue in a case that remains pending in that court.[12]

No purpose would be served by allowing the issue to percolate any longer in the courts of appeals. The opposing positions are thoroughly developed in the opinions of the Fifth and Seventh Circuits. The conflict is already creating considerable uncertainty for the EEOC, as well as other federal agencies,[13] with

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recognized—correctly, in our view—that Section 1981a(c)(1) has no relevance to the availability of compensatory damages in administrative proceedings.

[12] See Memorandum from Deputy Clerk of the 11th Circuit to Counsel or Parties in *Crawford* v. *Babbitt*, No. 97-8299 (11th Cir. Apr. 24, 1998) (requesting briefs on "the question of whether this Court should adopt the reasoning and holding in *Gibson* v. *Brown*, 137 F.3d 992 (7th Cir. 1998), and, if so, what effect it will have on the issues raised in this case"); see also *McAdams* v. *Reno*, 858 F. Supp. 945, 951 (D. Minn. 1994) (concluding that "compensatory damages are available to federal sector complainants in administrative proceedings" for violations of Title VII), aff'd on other grounds, 64 F.3d 1137 (8th Cir. 1995).

[13] The Merit Systems Protection Board (MSPB), for example, previously concluded, in reliance on the EEOC's decision in *Jackson*, *supra*, that the MSPB may award compensatory damages against federal agencies in administrative appeals of so-called "mixed cases" (*i.e.*, cases challenging significant adverse employment actions by federal agencies as having been motivated by "discrimination on the basis of race, color, religion, sex, national origin, handicap, or age," 29 C.F.R. 1614.302(a)(2) (1996)). See *Hocker* v. *Department of Transportation*, 63 M.S.P.R. 497, 505 (1994), aff'd, 64 F.3d 676 (Fed. Cir. 1995), cert. denied, 516 U.S. 1116 (1996). Under the rationale



regard to their authority to award compensatory damages in the thousands of administrative cases that arise annually under Title VII. A prompt resolution of the conflict would serve the interests of the federal government, as employer, and of federal employees by clarifying the process for asserting compensatory damages claims against federal agencies for violations of Title VII.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

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of the Seventh Circuit's decision, the MSPB, like the EEOC, would lack such authority.

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 96-3776

MICHAEL GIBSON, PLAINTIFF-APPELLANT

*v.*

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT-APPELLEE

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[Argued: Sept. 24, 1997
Decided March 3, 1998
Rehearing and Suggestion for Rehearing
En Banc Denied May 7, 1998]

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Before: RIPPLE, MANION and KANNE, Circuit Judges.

MANION, Circuit Judge.

Michael Gibson, a career federal employee at the Department of Veterans Affairs, experienced sex discrimination in 1992 when he applied to be a supervisory accountant at his supply depot but was turned down by his two female supervisors. The EEOC ordered Gibson's promotion (and backpay), but Gibson filed suit in the district court when the VA was slow to comply. By the time the district court ruled on his suit, the VA had implemented most of the Commission's order, making the complaint largely moot. But

Gibson's claim for compensatory damages remained. The court dismissed that claim after concluding that Gibson never asked the EEOC to compensate him for the VA's discrimination. We reverse.

## I.

In 1988 Michael Gibson began his career working for the VA as an accountant in the agency's Albuquerque, New Mexico facility. He transferred in 1990 to the VA supply depot in Hines, Illinois, where he later applied for a promotion to become a supervisory accountant (at the time, he was a GS-9 accountant). He did not get the promotion, and when Gibson's two female supervisors selected a woman for the position instead of him, Gibson filed a timely Title VII claim alleging sex discrimination. In July 1993, about a year after he had filed his claim, the VA issued its final agency decision finding no discrimination. Gibson appealed to the EEOC. In October 1995, the Commission reversed the VA, finding that the VA had indeed discriminated against Gibson in the promotion decision.

In the federal domain the EEOC's final determinations of discrimination are binding against government agencies unless the complainant himself seeks de novo review of that finding in federal court. *See* 29 C.F.R. § 1614.504(a) ("A final decision that has not been the subject of an appeal or civil action [by the complainant] shall be binding on the agency."); *Morris v. Rice*, 985 F.2d 143, 145 (4th Cir. 1993) ("[Congress] provided that final decisions of the EEOC were to be binding on federal agencies."). Accordingly, along with the parties we acknowledge that the VA discriminated against Gibson when his supervisors chose a less experienced woman to be the



supervisory accountant at Gibson's supply depot. The Commission also provided a remedy for the discrimination: it ordered the VA to promote Gibson and issue him backpay. The VA did these things, but reluctantly (a month late), prompting Gibson to file a federal complaint in district court seeking compliance with the Commission's nonappealable order. *See* 29 C.F.R. § 1614.408(a).

In the district court, Gibson asked for much of the relief that the VA belatedly gave him, which meant that for the most part his complaint was moot by the time the VA moved to dismiss it. But Gibson's claim for compensatory damages remained—specifically, he asked for compensatory damages relating to mental anguish and emotional distress resulting from the VA's discrimination (and experienced over the ensuing three years, during which Gibson was forced to work for the same supervisor who discriminated against him[1]). The district court interpreted the claim for compensatory damages as an entirely new claim of discrimination, and then dismissed it because Gibson did not present it in the first instance to the EEOC (or, in administrative law parlance, because Gibson had failed to exhaust his administrative remedies). The district court added that even if it interpreted the new claim as one seeking only relief (as we interpret it), *viz.* compensatory damages, the same rule of exhaustion would apply and require its dismissal.

Apparently the district court interpreted Gibson's claim for compensatory damages (as Gibson phrased

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[1] We express no opinion as to whether the working environment described by Gibson is worthy of compensatory damages.

it, damages for the "humiliation, mental anguish and emotional distress" caused by the VA's discrimination) as a claim for retaliation or postdiscriminatory harassment. Gibson does complain that he was forced to work for three years (from 1992-95, while the appeals were pending) for the same supervisor who had discriminated against him, but we do not interpret this as a new claim of discrimination. Under the Civil Rights Act of 1991, claims for compensatory damages are claims for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." See § 1981a(b)(3). Gibson asks for exactly these damages (even repeating the statute's language concerning "mental anguish"). Accordingly, we will treat his claim as one seeking recovery for the VA's discrimination rather than a brand new claim of discrimination.[2] As far as the government is concerned, the distinction ultimately makes no difference—whether Gibson raises a new instance of discrimination or a new demand for relief, it is barred because Gibson never presented it to the EEOC. Having determined that Gibson's complaint is a claim for damages—not a new claim of discrimination—we are left to decide whether the government correctly argues that it is barred anyway.

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[2] Even if we had interpreted Gibson's claim to be one of retaliation (for bringing his discrimination charge), we might not have agreed with the district court that Gibson was required to file a new charge of discrimination with the EEOC. A complainant need not file a new charge of discrimination to complain that the defendant retaliated against him for filing the first charge. *See McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 482 (7th Cir.1996). "In such cases, only a single filing [is] necessary to comply with the intent of Title VII." *Id.*



## II.

There is some dispute over whether Gibson asked the EEOC for compensatory damages. If he did, then the government's failure-to-exhaust argument obviously is a non-starter. But both parties agree that Gibson never asked to be compensated for emotional distress, or humiliation, nor did he invoke any other term typically associated with a demand for compensatory damages. (At one point, Gibson did instruct the EEOC investigator that he would settle his case for a "monetary cash award"; the relief ordered by the EEOC included backpay.) It would be simpler if we could say that Gibson put the EEOC on notice that he was seeking compensatory damages (as opposed to, say, backpay, which is considered equitable relief, § 1981a(b)(2)), but the record does not support it. Accordingly, we must now decide whether his failure to exhaust administrative remedies with respect to compensatory damages means he could not later obtain these damages from the district court.

Ordinarily, a failure to exhaust administrative remedies on an issue means that the complainant may not press his claim in federal court. *McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S. Ct. 1081, 1085-87, 117 L.Ed.2d 291 (1992). Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Id.* at 145, 112 S. Ct. at 1086. But it could go without saying that a party is not required to seek relief from an administrative agency (before seeking it from a federal court) if the agency does not have the power to redress a claim in the way the complainant requests. *Id.* at 148, 112 S. Ct. at 1088. In other words, while an administrative agency may be "competent to adjudi-

cate the issue presented," (here, Gibson's claim of discrimination), exhaustion is not required if it "lack[s] authority to grant the type of relief requested" (in this case, money damages). *Id., citing McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 675, 83 S. Ct. 1433, 1437-38, 10 L. Ed. 2d 622 (1963) (students seeking to integrate public school need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); *Montana Nat'l Bk. of Billings v. Yellowstone County*, 276 U.S. 499, 505, 48 S. Ct. 331, 333, 72 L. Ed. 673 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile since the county board of equalization was powerless to grant any appropriate relief").

In this case, Gibson says that while the EEOC can adjudicate the merits of his discrimination claim, and even provide equitable relief such as backpay and a promotion (both of which it ordered in his case), asking the EEOC to issue compensatory damages would be asking it to do what it has no authority to do. (Nothing in the statute or regulations explicitly rules out the idea, though the only payments mentioned in the regulations relate to "loss of earnings"—presumably backpay—caused by the federal agency's discrimination. *See* 29 C.F.R. § 1614.501(a).)

On the one hand it sounds logical that the EEOC can issue compensatory damages. After all, the agency was created by Congress not only to investigate complaints of discrimination, but, in the federal sector, to adjudicate them. And more than this, in the federal sector, Congress empowered the EEOC to



enforce Title VII's antidiscrimination provisions by issuing "such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities." 42 U.S.C. § 2000e-16(b). It is not unreasonable to conclude that this mandate might be broad enough to allow the EEOC to award compensation for mental anguish and emotional distress, much like the damages Gibson seeks in this case. Indeed, the Fifth Circuit cited this statutory language in concluding that Congress intended the EEOC to redress discrimination by any means necessary, including by issuing awards of compensatory damages; the court punctuated its determination by noting that the statute already allows the Commission to issue back pay, "which is a form of compensatory damages." *Fitzgerald v. Secretary, Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997). The Fifth Circuit certainly was correct to turn first to the language of Title VII to determine the scope of the EEOC's binding adjudicative powers, though we note its misstep in referring to backpay as a subset of compensatory damages. The Civil Rights Act of 1991 (governing awards for compensatory damages under Title VII) plainly states that they are distinct remedies. *See* 42 U.S.C. § 1981a(b)(2) ("Compensatory damages . . . shall not include backpay").

*Fitzgerald* places some emphasis on the EEOC's conclusion that the agency can issue awards for compensatory damages; the EEOC reached that determination through its adjudicative rather than rulemaking authority. The EEOC is free to choose that route to announce new principles (even a principle as significant as the one at play in this case), *see SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S. Ct. 1575, 1580,

91 L. Ed. 1995 (1947), but the availability of its rule-making powers means that "it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct." *Id.* Instead, the "function of filling in the interstices of regulatory statutes should be performed, as much as possible, though [the] quasi-legislative promulgation of rules to be applied in the future." *Id.* Even allowing some measure of deference to the EEOC's position, we note that the decisions themselves contain no particularly persuasive reasons why the agency should be allowed to issue compensatory damages, other than the reasons already noted by *Fitzgerald* itself. It appears that *Fitzgerald* cites these agency decisions (at least six of them) in order to give them deference, not because it finds them in any way convincing.

We have no difficulty in affording the EEOC a measure of deference—even when interpreting its own powers under a statutory scheme—so long as the interpretation is consistent with the plain language of the statute. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257-58, 111 S. Ct. 1227, 1235-36, 113 L. Ed. 2d 274 (1991) (rejecting EEOC's interpretation that Title VII applies extraterritorially because it "lack[ed] support in the plain language of the statute"). The section of Title VII pertaining to the federal sector, 42 U.S.C. § 2000e-16, is silent on the issue of compensatory damages, which makes sense because they were not even available in Title VII suits until Congress passed the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Section 1981a mentions compensatory damages in several places: in announcing their availability in "an action brought by a complaining party" (§ 1981a(a)(1)), in excluding backpay from



them (§ 1981a(b)(2)), in limiting their amount (§ 1981a(b)(3)), and, finally, in legislating that "[i]f a complaining party seeks compensatory or punitive damages . . . (1) any party may demand a trial by jury" (§ 1981a(c)). It is this last provision of the statute that is not discussed in *Fitzgerald* or, for that matter, in any of the EEOC decisions relied upon in *Fitzgerald*.

We cannot sidestep it. Our reading persuades us that it means what it says: if the complaining party (defined by § 1981a(d) as someone capable of suing in the first place) seeks compensatory damages, either party, including the defendant government agency, may demand a jury trial on the issue. Of course the EEOC does not provide jury trials; they are obtained in federal district court. *See* § 1981a(c)(2) ("the court shall not inform the jury of the limitations [on compensatory damages] described in subsection (b)(3) of this section"). Perhaps we could say that the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial. Not only would that be expensively duplicative, but it also probably would violate the rule that the EEOC's final determinations are binding against the agency (and thus are nonappealable). *See* 29 C.F.R. 1614.504(a). So we are left with this: if the EEOC issues compensatory damages, they necessarily are binding against the employing agency, meaning that the agency is deprived under the statute of its right to a jury trial. We agree with Gibson that the statutory scheme promulgated by Congress does not allow the EEOC to issue what would be nonappealable awards for compensatory damages; compensatory

damages are awarded within the jury system established by the statute.

We part company with *Fitzgerald* in reaching this conclusion for several reasons. Most important of these is the statutory language that *Fitzgerald* does not cite—the right of the complainant or the government agency to demand a jury trial under § 1981a(c) if the complaining party seeks compensatory damages. Under *Fitzgerald's* approach (and for that matter the EEOC's), the right to a jury trial under that section is lost. If we are to give effect to each section or provision in a statute, *United States v. Franz*, 886 F.2d 973, 978 (7th Cir.1989), it follows that we are particularly reluctant to interpret a statute in a way that altogether strikes a provision and a significant procedural right provided by it. It is quite possible that the *Fitzgerald* court never discusses the jury trial issue because the parties never raised it, thereby never alerting the court that the right to a jury trial conferred by § 1981a compels the conclusion we make today. Indeed, had the Fifth Circuit benefitted from as full a briefing on the issue as we have before us, it might well have reached a different conclusion.

In addition to the statutory language conferring a right to a jury trial, we note that the statute allows compensatory damages only "[i]n an *action* brought by a complaining party" under section 717 (the part of Title VII allowing federal employees to sue the government for discrimination, 42 U.S.C. § 2000e-16). See 42 U.S.C. § 1981a(a)(1) (emphasis added). Is an action a federal suit in district court, an EEOC proceeding, or both? Congress has demonstrated that it knows the difference between a civil action and an



administrative proceeding—in fact, it distinguishes between the two in the statute. *See* 42 U.S.C. § 1981a(d)(1)(A) (defining complaining party as "a person who may bring *an action or proceeding* under Title VII") (emphasis added).

Indeed, throughout the statutory scheme, Congress makes it clear that "actions" are civil actions pursued in courts, not administrative agencies. Section 706 of Title VII (the part applying to the private sector) tells us that the *United States district courts*—not the EEOC or any other administrative agency—"have jurisdiction of *actions* brought under [Title VII]." *See* 42 U.S.C. § 2000e-5(f)(3). The same holds true in federal sector suits like Gibson's. *See* § 717 of Title VII, 42 U.S.C. § 2000e-16 ("civil actions" against the government are to be pursued exactly "as provided" in section 706). Thus, when Congress uses the term "action" in Title VII, it is speaking of civil actions filed in federal court, not complaints of discrimination lodged with the EEOC. In enacting the Civil Rights Act of 1991, Congress could have chosen a more expansive term than "action" or even redefined "action" to include EEOC proceedings, but it did not.[3]

One additional factor persuades us that a government agency may not be held liable for compensatory damages without the benefit of a jury trial. By its terms, Title VII constitutes a waiver of sovereign immunity because it allows the government to be

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[3] In addition to the statute, the Regulations distinguish between civil actions (filed in court) and complaints (filed with administrative agencies) by allowing a complainant "who has filed an individual complaint" to file a "civil action in an appropriate United States District Court" within 90 days of a final agency decision. *See* 29 C.F.R. § 1614.408(a).

sued, *Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 94-95, 111 S. Ct. 453, 456-57, 112 L. Ed. 2d 435 (1990); the Civil Rights Act of 1991 extends that waiver by allowing the government to be sued for compensatory damages. But unless Congress tells us otherwise, we cannot further extend that waiver by allowing the government to be liable for compensatory damages at the administrative level (and without the benefit of a jury trial). *See id.* at 95, 111 S. Ct. at 457 (interpreting the very same provisions of Title VII—allowing suits against the government—and noting that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.").

As we have discussed, we think the government's statutory right to a jury trial is a clear expression by Congress that it has limited its waiver of sovereign immunity. If Congress wishes to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial, it is free to say so unequivocally. What the government asks us to do in this case is read an extension of the waiver into Title VII, for good reason something we should not do. The Supreme Court has instructed that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 2701, 69 L. Ed. 2d 548 (1981). In other words, a court has no business tinkering with elaborate statutory machinery like Title VII to find a waiver of sovereign immunity; the Government's consent to be sued must be interpreted, "in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, ——, 116 S. Ct. 2092, 2096, 135 L. Ed. 2d 486



(1996), and not "enlarged . . . beyond what the [statutory] language requires." *United States v. Nordic Village Inc.*, 503 U.S. 30, 34, 112 S. Ct. 1011, 1014-15, 117 L.Ed.2d 181 (1992). *See also United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 1615-16, 131 L. Ed. 2d 608 (1995) (when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court will "construe ambiguities in favor of immunity"). In this case, we would be doing more than tinkering—we would be redrafting (actually, reducing) the scope of sovereign immunity under the statute by allowing an administrative agency to issue nonappealable awards for compensatory damages, thereby wresting the matter from district courts and juries. That would not be consistent with our role, or with the statute Congress wrote.

## III.

In concluding that the EEOC may not order the government to pay compensatory damages, we recognize the EEOC's responsibility to issue any orders it deems "necessary and appropriate." We are not displacing any right that the EEOC historically has enjoyed. We simply conclude that Congress has determined it is inappropriate for the EEOC to order the government to pay compensatory damages, a right which it never had in the first place. *Fitzgerald* concludes otherwise, but the statutory provisions at play convince us not to follow the Fifth Circuit's lead.[4] "Our duty is to independently decide our own

[4] Because of this disagreement, this opinion was circulated to the full court for a vote on whether to grant rehearing en banc in advance of decision. *See* Circuit Rule 40(e). There were no votes to grant rehearing.

cases, which sometimes results in disagreements with decisions of the other circuits." *Atchison, Topeka and Santa Fe Railroad Co. v. Pena*, 44 F.3d 437, 443 (7th Cir.1994) (en banc), *aff'd. sub nom. Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railroad Co.*, 516 U.S. 152, 116 S.Ct. 595, 133 L. Ed. 2d 535 (1996). In this case, that means Gibson should have been allowed to pursue his claim in the district court. We already have concluded that it was not a new claim of discrimination. It was a claim for compensatory damages relating to his employer's discrimination, and it was not redressable by the EEOC. We reverse the district court and remand Gibson's claim so that it may be tried to a jury, which is what he has demanded in his complaint and what the statute allows.



**APPENDIX B**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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No. 96 C 223

MICHAEL GIBSON, PLAINTIFF

*v.*

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT

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[Filed: Oct. 3, 1996]

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MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

Presently pending before the Court is defendant Jesse Brown's motion to dismiss plaintiff Michael Gibson's ("Gibson") amended complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant Brown's motion alternatively seeks summary judgment. For the reasons that follow, defendant's motion is hereby granted in part and denied in part.

RELEVANT FACTS

Gibson is a federal employee with about 19 years of service credit with the Department of Veteran Affairs ("VA"). In 1992, Gibson complained of sex dis-

crimination in connection with his non-promotion to GS 11/12 Supervisory Accountant, a position that he claimed had been awarded to a less qualified female. Gibson's EEO Complaint described the issues in the following manner: "Non-selection for announcement 92-24 dated 2-28-92, instead announcement was reissued and given to an employee who did not qualify for bid 92-24, or selection of bid 92-41." (*See* Ex. 1, Plaintiff's Rule 12(m) Statement). When asked to specifically describe the basis of his complaint, Gibson stated: Selecting official stated that all applicants in the fiscal division for the position were very good. In fact I worked the position for several months, and felt I was in the right place at the right time with the right credentials, however a [sic] employee who did not qualify for bid 92-94 was selected. I can only conclude that preselection was made based on sex, all supervisors are now female. This type of discrimination should never be tolerated, however, when its aimed at a veteran, at the veteran's supply depot, words can't describe it. Veterans are why we have jobs. *Id.* Gibson specifically requested that the following corrective action be taken to rectify his complaint: "GS-11 backpay, transfer to VA Hines Hospital, or other hospital of my choice." *Id.*

After the Department of Veterans Affairs ("VA") found no discrimination, Gibson successfully appealed to the Equal Employment Opportunity Commission ("EEOC"). On October 6, 1995, the EEOC reversed the VA, finding that defendant discriminated against him based on sex, and that the VA's reasons for passing him over were pretextual. On November 6, 1995, the EEOC ordered defendant to promote plaintiff to the GS 11/12 Supervisory Accountant position



within 30 days. Defendant did not comply with this aspect of the EEOC order until December 23, 1995. The EEOC further ordered defendant to calculate plaintiff's backpay and interest within 60 days after the decision became final, and to pay plaintiff within 60 days thereafter. The defendant did not calculate Gibson's backpay and interest until January 29, 1996. Gibson was paid on February 22 and 24, 1996.

On January 11, 1996, Gibson filed this lawsuit seeking two kinds of relief. First, Gibson requested enforcement of those aspects of the EEOC decision with which defendant had not yet complied. (Complt. ¶¶ 9-16 and Exhibit A.) Second, Gibson sought the additional remedies of front pay, a declaration of his right to a transfer, a jury trial as to compensatory damages, and attorneys' fees incurred after October 6, 1995. (Complt. ¶¶ 9-11, 17-18 and Exhibit A.)

## STANDARDS

The United States seeks the dismissal of this action based on a variety of documents outside the pleadings, and Gibson has opposed that effort in the same manner. However, this does not automatically warrant conversion of the motion to one for summary judgment, because the United States is asserting that the Court lacks jurisdiction over Gibson's claims. *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986); *Castor v. United States*, 883 F. Supp. 344, 348 (S.D. Ind. 1995). In this situation, the district court is entitled to receive appropriate evidentiary submissions—"any rational mode of inquiry will do." *Crawford*, 796 F.2d at 929. It must then decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. "The

only exception is in instances when the jurisdictional issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.'" *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (*quoting Crawford*, 796 F.2d at 929). That exception is not triggered by the facts of this case. Accordingly, the Court will first decide jurisdictional issues based on all the materials the parties have submitted.

Since the United States seeks a case-dispositive outcome based on its motion, Gibson has been properly notified of the proper manner in which to contest the government's evidentiary materials and the consequences of failing to do so. *English v. Cowell*, 10 F.3d 434 (7th Cir. 1993). Gibson has been afforded "a full opportunity to present contradicting affidavits or materials in order to cure a jurisdictional or party defect not capable of being resolved on the words of the complaint." *Id.* at 437 (*citing Fountain v. Filson*, 336 U.S. 681, 69 S. Ct. 754, 93 L. Ed. 971 (1949)). Indeed, Gibson has submitted such materials to the court for its consideration in ruling on the instant motion. Given that Gibson has availed himself of the opportunity to submit materials outside the pleadings, to the extent the Court finds it has jurisdiction, it will treat defendant's motion as one for summary judgment.

ANALYSIS

To be heard in federal court, a plaintiff must first set forth an appropriate basis for jurisdiction. Gibson tries to rest the jurisdictional basis for this discrimination action on provisions of the Federal Tort Claims Act. He invokes the Act's provisions with



regard to his claims for compensatory and other money damages accruing since October 6, 1995, the day the EEOC reversed the VA's finding of no discrimination. However, Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, provides the exclusive remedy for claims of discrimination in federal employment. *Brown v. General Serv. Admin.*, 425 U.S. 820, 835 (1976). As such, it must govern jurisdiction. In *Brown*, the Supreme Court held that "[i]t would require suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme (of Section 717) to be circumvented through artful pleading." *Id.* at 832-33. The Seventh Circuit has rejected similar attempts to pend Bivens-styled constitutional claims onto Title VII actions. *Robbins v. Bentsen*, 41 F.3d 1195 (7th Cir. 1994). This Court must likewise reject plaintiff's attempts to plead any jurisdictional basis other than 42 U.S.C. § 2000e-16 in his complaint.

The Court finds other obstacles to exercising jurisdiction under the Federal Tort Claims Act. First, the Court has no jurisdiction to entertain tort claims against the United States where plaintiff has not first exhausted his administrative remedies under the Federal Tort Claims Act. 28 U.S.C. §§ 1346, 2671 *et. seq.*; *Erxleben v. United States*, 668 F.2d 268, 270 (7th Cir. 1981); *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972). Additionally, the VA is not a suable entity under the Federal Tort Claims Act, which permits suit only against the United States, not its agencies. 28 U.S.C. §§ 2679(a), (b)(1); *Finley v. United States*, 490 U.S. 545, 552-53 (1989); *Hughes v. United States*, 701 F.2d 56, 57 (7th Cir. 1982). Therefore, Gibson's failure to name the United

States as defendant in an FTCA suit also results in a fatal lack of jurisdiction. *Id.* Gibson's allegations that the Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346 are hereby dismissed with prejudice.[1]

The Court will therefore proceed to analyze Gibson's remaining claims pursuant to the statute appropriately governing this case, 42 U.S.C. § 2000e-16.

Plaintiff Is Barred From Raising Claims He Failed To Include In His EEOC Complaint

Title VII specifically requires a federal employee to exhaust his or her administrative remedies as a precondition to filing suit in federal court. *Robbins*, 41 F.3d at 1201-1203; *McGuinness v. United States Postal Serv.*, 744 F.2d 1318, 1319-20 (7th Cir. 1984) (citations omitted). The regulations under Title VII governing the administrative process require federal employees to bring complaints to the attention of the EEO counselor in the agency within 30 calendar days of the date of the alleged discriminatory event. 29 C.F.R. § 1613.214(a)(1)(i); *Wolfolk v. Rivera*, 729 F.2d 1114, 1116-17 (7th Cir. 1984). If the EEO counselor is unable to resolve the matter informally, the EEO counselor will issue the employee a notice of the right to file a formal complaint with the agency; the employee has 15 days after receipt of the notice to file a formal complaint. 29 C.F.R. § 1613.214(a)(1)(i). An employee has full rights to bring a reprisal action which can be consolidated with the underlying com-

[1] For the same reasons, this Court rejects Gibson's belated attempt to amend his jurisdictional allegation to include references to 28 U.S.C. § 1343 (statutory civil rights) and 28 U.S.C. § 1361 (mandamus).



plaint. 29 C.F.R. § 1613.262(b). The employee may bring an action in federal district court within 90 days of receiving notice of final action taken by the agency, or within 180 days of the date on which the formal complaint was filed if the agency failed to take action on the formal complaint. 42 U.S.C. § 2000e-16(c).

In his amended complaint, Gibson newly alleges the following facts:

> In addition to the wrongful deprivation of the promotion and backpay, Gibson has suffered and is continuing to suffer humiliation, mental anguish and emotional distress as a direct and proximate result of the VA's intentional and unlawful discrimination. Gibson worked for three years under a supervisor who wrongfully criticized his character and abilities in order to pass him over and promote a far less experienced co-worker; and the VA support the supervisor in her wrongful criticism of Gibson. Now, Gibson must work for the very supervisor who discriminated against him, a supervisor whose motives and credibility were successfully challenged by Gibson. Gibson is entitled to an award of compensatory damages, front pay and attorneys' fees since October 6, 1995, all in excess of $50,000.

(Complt. ¶¶ 17-18). None of these allegations were contained anywhere in Gibson's EEOC complaint. Therefore, as to these allegations, Gibson has failed to exhaust his administrative remedies.

As a general rule, a Title VII plaintiff is barred from bringing claims in a lawsuit which were not included in his EEOC charge. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Cheek v. Western*

*& Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). This rule serves two purposes: (1) it affords an opportunity for the EEOC to settle the dispute between the employee and employer and (2) it places the employer on notice of the charges against it. *Harper v. Godfrey*, 45 F.3d 143, 148 (7th Cir. 1995).

Gibson's EEOC charge simply does not describe the same conduct alleged in this lawsuit. *See Cheek*, 31 F.3d at 501. The new allegations are more in the nature of a retaliation claim and are not like nor reasonably related to the initial and straightforward failure-to-promote claim that Gibson presented to the EEOC. For example, Gibson now seeks to recover for what he labels as a three-year pattern of continued harassment by his supervisor. Yet, absolutely no mention of this pattern was made during Gibson's initial EEO charge. Gibson's harassment complaint also alludes to the fact that his new position requires him to work for this supervisor, yet this allegation significantly post-dates his initial non-selection complaint.

The Court finds that it is appropriate to strike Gibson's new allegations of discrimination based on past and current harassment by his VA supervisor, because he failed to raise them before either the VA or the EEOC, and has consequently failed to exhaust his administrative remedies regarding those claims. Both the VA and the EEOC should be given an opportunity to initially resolve any retaliation claims by Gibson.

Similarly, Gibson's claims of having suffered humiliation, mental anguish and emotional distress,



raised for the first time in this court, are barred.[2] Exhaustion of administrative remedies is a prerequisite to bringing an action under Title VII charging federal discrimination. *Brown*, 425 U.S. at 835.

While this Court acknowledges that policy considerations ordinarily point toward a liberal reading of the scope of an EEOC complaint, *see Egan v. Palos Community Hosp.*, 889 F. Supp. 331, 337 (N.D. Ill. 1995), the Court expressly finds that allowing Gibson to proceed with his new claims before this Court would lead to an easy circumvention of the careful statutory administrative EEOC structure Congress has set up to resolve federal employee discrimination claims. Gibson never provided the VA with notice or an adequate opportunity to resolve his new claims. Gibson's failure to exhaust his administrative remedies regarding his new discrimination claims deprives this Court of jurisdiction over those claims. *Pack v. Marsh*, 986 F.2d 1155, 1157 (7th Cir. 1993). Thus, ¶¶ 17 and 18 of Gibson's complaint, which contain

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[2] This Court also must reject Gibson's claim that it would be futile to force him to request compensatory damages because the EEOC has not explicitly adopted procedures and regulations to address such issues since the passage of the Civil Rights Act of 1991. This assertion overlooks the conciliatory purposes of the federal EEO structure and the specific need to provide notice and an opportunity to settle. These procedures are supposed to be more than a weigh station on the road to federal court. Additionally, the Court rejects plaintiff's argument that the government should be estopped from asserting administrative exhaustion as to his claim for compensatory damages. The Court's review of all the objective evidence indicates that Gibson never asserted facts which would reasonably lead to compensatory damages during the administrative processing of his complaint.

these new claims, are hereby dismissed with prejudice.

The Defendant Is Entitled to Summary Judgment With Respect To Plaintiff's Claims for Front Pay And A Job Transfer

This Court does, however, have jurisdiction to consider Gibson's requests for front pay and a job transfer, which arise out of claims he presented during the administrative process. Therefore, the Court will go on to decide these issues applying the standards for summary judgment.

Despite having received his retroactive promotion to a GS-12 position, Gibson presently seeks an award of front pay. The question of whether a district court may order front pay as part of the equitable relief permitted by Title VII remains an open question in the Seventh Circuit. *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 678 (7th Cir. 1993). However, circuit courts addressing the issue of front pay in Title VII promotion cases have held that the award of front pay is designed to provide plaintiff with the salary differential to which plaintiff would have been entitled had he received the promotion he sought. *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1448 (9th Cir. 1990). Once plaintiff receives the promotion, there is no basis for a further front pay damage award. *Id.*; *see also E.E.O.C. v. Pacific Press Pub. Ass'n.*, 482 F.Supp. 1291, 1320-21 n. 44 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982).

In this case, there is no dispute that Gibson has received retroactive promotion to a GS-12 accountancy position, and has in fact received retroactive GS-12 backpay and interest on that backpay. (Defendant's



Rule 12(m) Statement at ¶ 16; Exs. 5 and 6). Awarding front pay is therefore legally inappropriate. The defendant is consequently entitled to summary judgment with respect to Gibson's claim for front pay.

Similarly, Gibson's claim for a job transfer is addressed to the sound discretion of this Court. A job transfer is an appropriate remedy when an individual has experienced discrimination specifically with respect to a job transfer, *see Odima v. Westin Tuscon Hotel*, 53 F.3d 1484, 1488 (9th Cir. 1995), or for redressing widespread discrimination in promotion or transfer policies, *see Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896, 901 (7th Cir. 1973); *EEOC v. AT & T*, 419 F. Supp. 1022, 1039 (E.D. Pa. 1976) (Higginbotham, J.). Moreover, transfer is an extraordinary remedy that has a harmful effect on innocent third parties. *See, e.g., Hicks v. Dotham City Bd. of Educ.*, 814 F. Supp. 1044, 1050-52 (M.D.Al.1993); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Romasanta v. United Airlines, Inc.*, 717 F.2d 1140, 1148 (7th Cir. 1983). Displacement should "be used sparingly and only when a careful balancing of the equities indicates that absent 'bumping', plaintiff's relief will be unjustly inadequate." *Hicks*, 814 F. Supp. at 1050 (citations omitted). Given this Court's determinations regarding the proper scope of Gibson's lawsuit and its resulting decision to dismiss ¶¶ 17 and 18 of his complaint, Gibson has not even come close to establishing that he is entitled to the extraordinary remedy of a job transfer.[3] Therefore, the Court hereby

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[3] Gibson's complaint does not explicitly seek outright de novo review of his right to a job transfer, which he did request in his EEO complaint. *See Morris v. Rice*, 985 F.2d 143, 145 (9th Cir.1993) (a federal employee may raise de novo review

grants the defendant summary judgment with respect to Gibson's claim for a job transfer.

Plaintiff's Receipt of Relief Ordered by the EEOC Moots His Enforcement Claims

Finally, Gibson's amended complaint requests the following additional relief, specifically: (1) an order directing the VA to submit a backpay calculation to plaintiff; (2) enforcement of the EEOC decision requiring the VA to adhere to the deadline for payment of the undisputed portion of backpay as if defendant has complied with the deadline for calculating backpay; and (3) attorneys' fees.

Plaintiff's claims for backpay calculations and backpay have been mooted by his receipt of a retroactive GS-12 promotion and backpay and interest. (Defendant's 12(m) Statement at ¶ 16; Exs. 5 and 6). Indeed, plaintiff has shown no harm caused by an alleged delay in receipt of the promotion and backpay.

Plaintiff's Attorneys' Fees Request

The Court, however, does not agree with the defendant's position that plaintiff's request for attorneys' fees also must be denied as moot. Because of the defendant's delay in complying with the EEOC's order, the plaintiff had no choice but to file this lawsuit to ensure compliance. Federal law imposes a strict 90-day deadline after receipt of a final EEOC decision for filing an enforcement action in federal court. 42 U.S.C. § 2000e-16(c). In this case, there is

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remedial issues); *see also Pecher v. Heckler*, 801 F.2d 709, 711 n. 3 (4th Cir.1986). Nevertheless, this Court has independently reviewed this issue and has determined that a job transfer was not warranted under the facts presented to the EEOC.



no question that as of the 90-day deadline, the defendant had not fully complied with the EEOC's order. The defendant asserts that the reasons for this delay were partly caused by the governmental budgetary shutdown as well as plaintiff's own inaction. This Court finds that plaintiff's own actions were not sufficient to excuse all of the delay that occurred in compliance, and certainly do not justify a blanket denial of attorneys' fees under the circumstances of this case.

The Court finds that the uncontested facts establish that the defendant did not fully comply with the EEOC's final order until after the plaintiff filed this lawsuit. Thus, plaintiff is a "prevailing party", entitled to reasonable attorneys' fees since this lawsuit was the "catalyst" to secure enforcement of the EEOC's order. *See Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). Thus the Court will enter judgment in favor of plaintiff to this limited extent and retain jurisdiction over this matter for the sole purpose of determining an appropriate award of attorneys' fees for the plaintiff.

CONCLUSION

Defendant's motion to dismiss, or in the alternative for summary judgment, is granted in part and denied in part. Defendant's motion to dismiss (12-1) is hereby granted to the extent that the Court has dismissed Gibson's allegations of jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346. Defendant's motion for summary judgment (12-2) is granted to the extent that the Court has ruled for the defendant on plaintiff's request for enforcement of the remedial EEOC order, compensatory damages, front pay and a job transfer.

Based on the undisputed facts, the Court also finds that the entry of summary judgment in favor of Gibson on his request for attorneys' fees is appropriate. The Clerk of the Court is directed to enter appropriate Fed.R.Civ.P. 58 orders.

The Court will retain jurisdiction over this case to determine a reasonable award of attorneys' fees under the circumstances of this case. This award of fees will be limited to those hours that were reasonably necessary to achieve full compliance with the final EEOC order. Plaintiff is given leave to file his attorneys' fees request by October 30, 1996, and the defendant should file any objections by November 21, 1996. Any reply brief shall be filed by December 1, 1996. The Court will rule by mail.



**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

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No. 96-3776, No. 96 C 223

MICHAEL GIBSON, PLAINTIFF-APPELLANT

*v.*

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, DEFENDANT-APPELLEE

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

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[May 7, 1998]

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**ORDER**

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Before: RIPPLE, MANION and KANNE, Circuit Judges.

CASTILLO, District Judge.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon and all of

the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.



## APPENDIX D

### STATUTORY PROVISIONS INVOLVED

Section 1981a of Title 42 of the United States Code (1994) provides, in pertinent part, as follows:

**Damages in cases of intentional discrimination in employment**

**(a) Right of recovery**

**(1) Civil rights**

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * * * *

**(b) Compensatory and punitive damages**

**(1) Determination of punitive damages**

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complain-

ing party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

**(2) Exclusions from compensatory damages**

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

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**(c) Jury Trial**

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury

* * *

**(d) Definitions**

As used in this section:

**(1) Complaining party**

The term "complaining party means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)

* * * * *



Section 717 of Title VII the Civil Rights Act of 1964, as amended, as codified at 42 U.S.C. 2000e-16 (1994 & Supp. II 1996), provides, in pertinent part, as follows:

**Employment by Federal Government**

**(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage**

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

**(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of program reports; consultations**

**with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress**

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. * * *

**(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant**

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department,



agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

* * * * *